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Improving State Aid Control through Independent National State Aid Authorities

Back in 2005, as part of its State Action Plan,¹ the European Commission proposed the creation of National State Aid Authorities by Member States (MS).² Following the success of control of state aid in Central and Eastern Europe Countries,³ which were required to establish national State aid monitoring authorities, during the EU pre-accession phase.⁴

Yet, public enforcement of state aid law in the Member States is currently performed based on different models: by units within the

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¹ State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM (2005) 107 final para. 51.

² Results of the consultation on the State aid control plan (SAAP) – detailed summary pp. 26-27. Available at https://ec.europa.eu/competition/state_aid/reform/comments_saap/index.html assessed October 2020.

³ In 2004 and 2007, ten new Member States from Central and Eastern Europe Countries joined the European Union.

⁴ Cremona M., “State Aid Control: Substance and Procedure in Europe Agreements and the Stabilisation and Association Agreements” (2003) 9 European Law Journal, p. 265-287;

governmental structure or by national competition authorities and lastly by independent monitoring authorities.⁵ Nor does a network of State Aid National Authorities similar to the European Network of Antitrust Authorities exist.

The distribution of the competences laid down in the Treaty on the Functioning of the European Union (TFEU), has led scholars to argue that State aid control is an example of direct execution.⁶

Pursuant to Article 108 TFEU the European Commission has the exclusive competence to decide on the compatibility of the national aid measures with the internal market. Member States must notify in advance the Commission of any State aid measure they intend to grant. Only those measures approved by the Commission can be implemented. Nevertheless, national administrations also play a role in State aid control. Regulation 614/2015 enables the Commission to adopt group exemption regulations (GBER), providing for certain categories of horizontal aid which are exempted from the notification requirement due to their small distortive effect. These exemptions require a bigger responsibility from the Member States.⁷

Indeed, national institutions need to verify that the aid measures fulfil the conditions provided in group exemption regulations. Moreover, Member States have also to report and monitor the exempted measures.

⁵ M. Negenman, "A state aid network?" (2011) 4 EStAL 621-627.

⁶ Colombo C., "State Aid Control in the Modernisation Era: Moving Towards a Differentiated Administrative Integration?" (2019) 25 European Law Review, pp. 292-316.

⁷ Sinnaeve A., "Block exemptions for State aid: more scope for State aid control by Member States and competitors" (2001) 38 CMLR, pp. 1479-1501.

General Block Exemption Regulation,⁸ introduced within the most recent reform of the State aid regime – the State Aid Modernisation (SAM) – has increased the possibilities for Member States to grant State aid, without prior checks from the Commission.

Moreover, under SAM, national administrations have new implementing responsibilities including the transparency and *ex-post* evaluation obligations.⁹

However, the Member States' failure to comply with State aid rules remains a significant problem. The reasons of non-compliance with State aid rules can be incorrect understanding including not knowing the rules on State aid, or faulty analysis of these rules that guides to the decision that a measure is in compliance with the primary EU State aid legislation, or, intentional infringement of State aid rules either at the design stage of the measure or at the application stage.¹⁰

Irregularities have been particularly found related to non-notified aid.¹¹ Statistics reveal that during the period 2000-2012 the Commission took 986 decisions on unlawful aid, 23% of which resulted with recovery decisions. The intervention of the Commission through negative

⁸ Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in the application of the Articles 107 and 108 of the Treaty OJL 187.

⁹ Colombo C., "State Aid Control in the Modernisation Era: Moving Towards a Differentiated Administrative Integration?" (2019) 25 European Law Review, pp. 292-316.

¹⁰ Nicolaides P., 'State Aid Modernization: Institutions for Enforcement of State Aid Rules' (2012) 35 (3) World Competition 457-461.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM) COM(2012) 209 final para 21.

decisions in the cases of non-notified aid is ten times higher compared to notified aid.¹²

The creation of independent National State Aid Authorities can make State aid control more effective, even if different legislations in the Member States can trigger asymmetric application of the established rules in the EU. It is an important topic that should be fully analysed in an European perspective, also considering the applicable legal provisions and what is the level of State aid control at national level, even considering the possible positive effects of the creation of independent National State Aid Authorities in the enforcement of State aid rules

In the past, the Commission suggested to create national authorities to enforce State aid rules. Some Member states decided to assign competences to existing authorities such as the ones that guarantee competition (antitrust authorities).

Regulatory authorities can play a very important role in controlling state aid in the preventive phase, for example in the case of aid not subject to prior notification.

For this reason, it is significant to note the structure and competences assigned to the authorities in question. Furthermore, it is necessary to carefully evaluate the criteria for appointing the authorities: if an eminently technical role is to be attributed, it is necessary to create a system that is capable of freeing the authorities from the government.

¹² State aid Scoreboard Autumn 2012 COM (2012) 778 final para 5.1.

In this case, they would be truly independent and would perform a prior national compatibility control function that can avoid negative surprises such as, for example, the declaration of incompatibility and the consequent decision to recover what was unduly received.

In this perspective, collaboration between institutions in preventing cases of illegitimate aid would be strengthened. Furthermore, the creation of independent state aid authorities can also be the basis for keeping the aid register, which allows the quality and quantity of aid granted to be monitored. Finally, the importance of the authorities in terms of clearing house between requests from the business world and government economic planning should be emphasized, in an overall system aimed at implementing the application of the rules on state aid.

Ultimately, it is a question of improving the governance of the state aid sector for this reason, the Commission, as mentioned, had proposed the constitution of independent authorities with responsibility for domestic control.

The aid sector is naturally exposed to political constraints and, therefore, the reliance on an authority that collaborates directly with the Commission to ascertain and provisionally recover aid granted illegally or that controls the execution of recovery decisions appears useful and functional for the purpose.

States should be more vigilant in verifying the conditions of applicability of the derogations envisaged for horizontal aids or for those exempted from prior notification. And they will be better able to organize themselves as regards the retention of information regarding the aid

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granted, so as to allow the Commission, in the case of ex post control, to quickly find all the information necessary to reach a timely decision on compatibility.